

A Sungei Rinching Sdn Bhd v Sri Keluarga Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-95-95

NH CHAN, ABU MANSOR AND ABDUL MALEK JJCA
19 APRIL 1996

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Companies and Corporations — Winding up — Opposition to petition — Notice of demand — Allegation that amount stated in notice included element of continuing interest which was not stipulated — Whether notice defective — Whether fatal — Companies Act 1965 s 218(2)(a)

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The respondent obtained summary judgment on 28 October 1993 against the appellant in the High Court at Kuala Lumpur for the sum of 'RM203,780.87 together with interest thereon at the rate of 8% per annum from 28 October 1993 till the date of realization and costs'. The judgment arose from a debt due from the appellant to the

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respondent for goods sold and delivered. The appellant's subsequent appeal to the (then) Supreme Court was dismissed on 1 March 1994. Thereafter, the respondent commenced execution by sending a notice of demand pursuant to s 218(2)(a) of the Companies Act 1965 ('the

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notice of demand') to the appellant, demanding the sums due under the judgment. The appellant did not respond to the notice of demand within the time prescribed, and the respondent took out a winding-up

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petition against the appellant on 30 August 1994. At the hearing, counsel for the appellant contended that: (a) the notice of demand was defective as the sum of RM203,780.87 in the body of the notice included an element of continuing interest which was not stipulated, and

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this, together with interest thereon at the rate of 8% per annum from 28 October 1993 to the date of final payment, rendered the notice of demand invalid; and (b) in the absence of a valid notice, there was no evidence of insolvency. In reply, counsel for the respondent argued that the the judgment sum was stated as RM203,780.87 in the

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summary judgment, and this was also affirmed by the Supreme Court in the subsequent appeal. He further submitted that the same amount in the summary judgment in the High Court had been demanded in the notice of demand and that the appellant was in no way misled as to the amount. The trial judge ordered a winding up. The appellant appealed.

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Held, dismissing the appeal with costs:

- (1) The respondent's contention that the demand was valid was upheld, since the sum and interest could easily be ascertained. The amount of the costs was not mentioned since it could not be ascertained at that stage because of the appeal (see p 204D); *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313 distinguished.

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- (2) The appellant's appeal was dismissed by the Supreme Court on 1 March 1994, and for nearly two years, the appellant never did anything to settle its debt. Such conduct could, therefore, be interpreted as the appellant's inability to pay its debt, having held that the demand was a valid demand (see p 204G); *Re Tweeds Garages Ltd* [1962] 1 Ch 406 followed.
- (3) In view of the decision that the notice of demand was valid, it was further held that the appellant's second ground was devoid of any merit. The trial judge was correct in his finding that the appellant was unable to pay its debt and that the appellant should be wound up (see p 205C).

[Bahasa Malaysia summary]

Pada 28 Oktober 1993, penentang telah memperolehi penghakiman terus terhadap perayu di Mahkamah Tinggi Kuala Lumpur untuk jumlah sebanyak 'RM203,780.87 bersama dengan faedah di atasnya pada kadar 8% setahun dari 28 Oktober 1993 hingga tarikh penyelesaian dan kos'. Penghakiman tersebut timbul daripada suatu hutang yang harus dibayar oleh perayu kepada penentang bagi barang-barang yang dijual dan dihantar-serah. Rayuan perayu pada kemudiannya kepada Mahkamah Agung (pada masa itu) telah ditolak pada 1 Mac 1994. Selepas itu, penentang telah memulakan pelaksanaan dengan menghantar satu notis tuntutan menurut s 218(2)(a) Akta Syarikat 1965 ('notis tuntutan tersebut') kepada perayu, dan menuntut jumlah yang terhutang di bawah penghakiman. Perayu tidak menjawab notis tuntutan dalam tempoh yang ditetapkan, dan penentang telah mengambil satu petisyen penggulungan terhadap perayu pada 30 Ogos 1994. Di pembicaraan, peguam untuk perayu berhujah bahawa: (a) notis tuntutan itu tidak elok kerana jumlah RM203,780.87 yang terkandung dalamnya termasuk suatu unsur faedah berterusan yang tidak dinyatakan, dan ini, bersama dengan faedah di atasnya pada kadar 8% setahun dari 28 Oktober 1993 hingga tarikh pembayaran muktamad, menyebabkan notis tuntutan tak sah; dan (b) dalam ketiadaan satu notis sah, tidak terdapat bukti ketaksolvenan. Sebagai balasan, peguam untuk penentang berhujah bahawa jumlah penghakiman dinyatakan sebagai RM203,780.87 dalam penghakiman terus, dan ini juga telah disahkan oleh Mahkamah Agung dalam rayuan kemudiannya. Beliau selanjutnya menghujah bahawa amaun yang sama dalam penghakiman terus di Mahkamah Tinggi telah dituntut dalam notis tuntutan dan bahawa perayu tidak dikelirukan dalam apa-apa cara berkaitan dengan amaun. Hakim perbicaraan memerintahkan suatu penggulungan. Perayu membuat rayuan.

Diputuskan, menolak rayuan dengan kos:

- (1) Hujahan penentang bahawa tuntutan adalah sah dibenarkan, oleh kerana jumlah dan faedah boleh dipastikan dengan

- A mudahnya. Amaun kos tidak disebut oleh kerana ia tidak boleh dipastikan pada tahap itu akibat rayuan yang berkenaan (lihat ms 204D); *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313 dibeza.
- B (2) Rayuan perayu telah ditolak oleh Mahkamah Agung pada 1 Mac 1994, dan selama hampir dua tahun, perayu tidak pernah berbuat apa-apa bagi menjelaskan hutang itu. Dengan itu, kelakuan sedemikian boleh ditafsirkan sebagai ketidakmampuan perayu untuk membayar hutangnya, setelah memutuskan bahawa tuntutan itu adalah suatu tuntutan sah (lihat ms 204G); *Re Tweeds Garages Ltd* [1962] 1 Ch 406 diikuti.
- C (3) Memandangkan keputusan bahawa notis tuntutan tersebut adalah sah, adalah dengan selanjutnya diputuskan bahawa alasan kedua perayu tidak mempunyai sebarang merit. Hakim perbicaraan adalah betul dalam pendapat bahawa perayu tidak mampu membayar hutangnya dan perayu harus digulung (lihat ms 205C).]
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[*Editorial Note*: The appellant has applied for leave to appeal to the Federal Court vide Civil Application No 08-1-1996.]

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Notes

For cases on opposition to winding-up petitions, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 511-515.

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Cases referred to

Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447

Fawzia bte Osman v Bank Bumiputra Malaysia Bhd and another appeal [1991] 1 MLJ 426

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Perusahaan Jenwatt Sdn Bhd, Re [1990] 2 MLJ 178

Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1992] 1 MLJ 313

Tweeds Garages Ltd, Re [1962] 1 Ch 406

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Legislation referred to

Companies Act 1965 s 218(2)(a)

Appeal from: Company Winding Up No D3-28-283-94 (High Court, Kuala Lumpur)

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K Chandrasekar (Nik Hussain & Partners) for the appellant.

Siva Dharma (Siva Dharma & Associates) for the respondent.

Abu Mansor JCA (delivering the judgment of the court): We dismissed this appeal with costs to the respondent on 12 December 1995 after hearing full arguments, and we now give the reasons for our judgment.

The undisputed facts of this appeal are as follows. The respondent obtained summary judgment on 28 October 1993, against the appellant in the High Court at Kuala Lumpur vide Suit No D1-22-176-92 for the sum of RM203,780.87 together with interest thereon at the rate of 8% per annum from 28 October 1993 till the date of realization and costs ('the said judgment').

The said judgment arose from a debt due from the appellant to the respondent for goods sold and delivered on a running account basis from May 1990.

Subsequently, the appellant appealed to the Supreme Court vide Supreme Court Civil Appeal No 02-647-93, and the appeal was dismissed on 1 March 1994.

The respondent issued a notice of demand dated 4 March 1994 ('the notice of demand') to the appellant, demanding the sums due under the said judgment.

The appellant did not respond to the notice of demand within the time prescribed and the respondent took out a winding-up petition against the appellant on 30 August 1994.

Mr Chandrasekar for the appellant raised two grounds:

- (a) that the notice of demand under s 218(2)(a) of the Companies Act 1965 was defective; and
- (b) in the absence of a valid notice, there was therefore no evidence of insolvency.

He submitted the said notice read as follows:

Statutory Demand Pursuant to s 218 of the Companies Act 1965 for Payment of a Debt

To:

Sungei Rinching Sdn Bhd
11-2, Jalan 1/57A
Batu 3, Jalan Ipoh
51200 Kuala Lumpur

Take Notice that Sri Keluarga Sdn Bhd being a company to which the said Sungei Rinching Sdn Bhd is indebted in a sum exceeding Ringgit Five Hundred (RM500), namely in the sum of Ringgit Two Hundred and Three Thousand and Seven Hundred Eighty and Sen Eighty Seven (RM203,780.87) only together with interest thereon at the rate of 8% per annum from 28 October 1993 to the date of final payment and costs requires the said Sungei Rinching Sdn Bhd to pay to it, the said Sri Keluarga Sdn Bhd, or to secure or compound to its reasonable satisfaction the sum of RM203,780.87 together with interest thereon at the rate of 8% per annum from 28 October 1993 to the date of final payment and costs being the

- A amount due and owing in respect of a judgment obtained against you in proceedings known as Kuala Lumpur High Court Suit No D1-22-176-92, full particulars whereof have already been supplied. And Take Further Notice that if at the expiration of twenty-one (21) days from the date of service hereof, the said Sungei Rinching Sdn Bhd fails to comply with the terms hereof, the said Sungei Rinching Sdn Bhd will, pursuant to s 218(2)(a) of the Companies Act 1965 be deemed to be unable to pay its debts as and when they fall due and proceedings may thereafter be commenced to wind up the said Sungei Rinching Sdn Bhd pursuant to the Companies Act.
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Dated 4 March 1994.

- C Signed on behalf of Sri Keluarga Sdn Bhd by its lawfully authorized agent and solicitors.

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Messrs Siva Dharma & Associates
Solicitors for Sri Keluarga Sdn Bhd

- D Learned counsel for the appellant further submitted that the notice was defective as the sum of RM203,780.87 in the body of the said demand included an element of continuing interest not stipulated and this, together with interest thereon at the rate of 8% per annum from 28 October 1993 to the date of final payment, rendered the notice of demand invalid.

- E He relied on the Supreme Court case of *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313 at p 317, where his Lordship Gunn Chit Tuan SCJ (as he then was) cited with approval his Lordship Zakaria J's judgment in *Re Perusahaan Jenwatt Sdn Bhd* [1990] 2 MLJ 178 in which Zakaria J (as he then was) held, inter alia, that the notice of demand must comply strictly with the requirements of s 218(2)(a) of the Companies Act 1965 because the amount stated in the said notice was far in excess of the debt due and the failure on the part of the company to pay the sum claimed did not mean that the company was unable to pay its debts.
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- G Counsel for the appellant also submitted that it is for the creditor to state the amount of demand correctly and not for the debtor to make enquiries.

In support of his appeal, he also cited the case of *Fawzia bte Osman v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 1 MLJ 426, where the then Supreme Court held that the notice of demand was void ab initio where it stated (at the same page):

- H ... payment within seven days were for of 'the sum of RM612,065.07 together with interest to accrue thereon at the agreed rate of 13.25% pa as from 31 October 1984 to date of actual realization and RM300 costs'.

He had submitted that, equally in our present appeal, the demand was erroneous and the demand cannot therefore be valid.

- I In reply, Mr Siva Dharma for the respondent contended that the debt of the appellant was created in May 1970. Proceedings to claim back the goods were commenced in the High Court at Kuala Lumpur in

January 1992 and summary judgment was obtained on 28 October 1993. The appeal on the summary judgment for the sum of RM203,780.87 went on appeal to the then Supreme Court on 1 March 1994 and the appeal was dismissed. Thereafter, the respondent commenced execution after 1 March 1994 by sending the said notice of demand.

When the respondent was not paid, they filed a petition for winding up on 30 August 1994 and on 7 December 1994, the learned judge ordered a winding up.

Learned counsel for the respondent referred to the original judgment in this case (see p 41 of the appeal record) where the judgment is stated to be for RM203,780.87 and this was the judgment that was affirmed by the Supreme Court. He submitted that the same amount in the original judgment in the High Court had been demanded in the notice of demand sent to the appellant. He further submitted that the *Sri Hartamas* case cited by counsel for the appellant was distinguishable, in that the appellant was in no way misled as to the amount. We upheld the respondent's counsel's contention that the demand was valid since the sum and interest could easily be ascertained, although the amount of the costs was not mentioned since it could not be ascertained at that stage because of the appeal.

The respondent's counsel cited *Chip Yew Brick Works Sdn Bhd v Chang Heer Enterprise Sdn Bhd* [1988] 2 MLJ 447, where at p 448 Wan Hamzah SCJ held:

In our judgment, as the debt of RM60,580 is not disputed the respondent company is caught under s 218(2)(a) as having neglected to pay it and is deemed to be unable to pay its debt. The amount of the admitted and unpaid debt is substantial, and it was almost half of the amount claimed by the appellant. Therefore the appellant should not be prevented from pursuing its petition so that the court would be able to consider all evidence and determine whether it should exercise its discretion to order winding up or not to order it. If an order of winding up is made, the respondent company can still defend on the balance amount in dispute.

We took particular note that the appellant's appeal was dismissed by the Supreme Court on 1 March 1994, and for nearly two years, the appellant never did anything to settle its debt; such conduct could, therefore, be interpreted as the appellant's inability to pay its debt having held that the demand was a valid demand.

We are fortified in the view we took by the judgment in *Re Tweeds Garages Ltd* [1962] 1 Ch 406 (not cited to us) where at p 413, his Lordship Plowman J, in considering whether to order that an insolvent company be wound up, held (at pp 413-414):

From those sections it appears that the only qualification which is required of the petitioners in this case is that they are creditors and about that, as I have said, there is really no dispute. Moreover, it seems to me that it would, in many cases, be quite unjust to refuse a winding-up order to a petitioner who is admittedly owed money which has not been paid merely because there is a dispute as to the precise amount owing. If I may refer to an

- A example which I suggested in the course of argument, suppose that a creditor obtains judgment against a company for £10,000 and after the date of the judgment something is paid off. There is a genuine bona fide dispute whether the sum paid off is £10 or £20. The creditor then presents a petition to have the company wound up. Is the company to be entitled to say: 'It is not disputed that you are a creditor but 'the amount of your debt is disputed and you are not, therefore, 'entitled to an order?' I think not. In my judgment, where there is no doubt (and there is none here) that the petitioner is a creditor for a sum which would otherwise entitle him to a winding-up order, a dispute as to the precise sum which is owed to him is not of itself a sufficient answer to his petition.
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- C In view of our decision on the first ground that the notice of demand was valid, we find that the appellant's second ground was devoid of any merit. We therefore held that the learned trial judge was correct in his finding that the appellant was unable to pay its debts and the appellant should be wound up. We dismissed the appeal with costs to the respondent.
- D *Appeal dismissed with costs.*

Reported by TA Loh

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